No. 269. 67.
Holmes & Mason for
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Office Supreme Court U.S.
FILED
APR 15 1901
JAMES H. MCKENNEY,
Clerk.

Filed April 15, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 269.

E. T. WILSON, RECEIVER OF THE FIRST NATIONAL BANK OF HELENA, MONTANA,
Plaintiff in Error,
vs.
THE MERCHANTS LOAN AND TRUST COMPANY OF CHICAGO, ILLINOIS,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF PLAINTIFF IN ERROR.

DELEVAN A. HOLMES,
For Plaintiff in Error.

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BARNARD & MILLER, PRINT.

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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was brought in the District Court of the United States for the Northern District of Illinois, Northern Division, by E. T. Wilson, Receiver of the First National Bank of Helena, Montana, to recover from The Merchants Loan & Trust Company, a corporation of Illinois, an assessment of One Hundred Dollars ($100) per share upon one hundred and twenty (120) shares of the stock of said First National Bank.

The declaration after reciting the fact of the insolvency of the National Bank, the appointment of Receivers and the assessment upon the shareholders, states in substance:

That the defendant, The Merchants Loan & Trust Company had some time between the first day of Decem-

ber, 1894, and the first day of June, 1895, purchased and become the owner of one hundred and twenty (120) shares of the capital stock of said National Bank, and continued to be, and was at the time of the suspension of the Bank, the owner of same. But, in order to evade the responsibility of a shareholder, had caused said shares to be carried in the name of P. C. Peterson, one of its employees, who was a person of small means and not responsible financially.

The pleas were, first, *nil debit;* second, denial of purchase and ownership of stock by the Trust Company, and third, that the one hundred and twenty shares of stock were held in the name of P. C. Peterson as trustee for the security of the payment of a promisory note of one Ashby to the Trust Company. There was a written stipulation waiving trial by jury, and the cause was submitted to the Court upon an agreed statement of facts.

The court made a general finding of the issues for the defendant and entered judgment thereon, from which the plaintiff prosecuted error in the Circuit Court of Appeals for the Seventh Circuit, where the judgment of the District Court was affirmed. The case now comes to this court upon Writ of Error to the said Circuit Court of Appeals.

The errors assigned in the Circuit Court of Appeals were:

First: The court erred in finding the issues in favor of the defendant.

Second: The court erred in overruling the motion of the plaintiff for a new trial.

Third: The court erred in entering judgment in favor of the defendant and against the plaintiff.

The facts upon which the action was predicated, briefly stated, are as follows:

On the 15th day of April, 1893, the defendant received from one Ashby one hundred and fifty shares of stock in the Helena National Bank (of which bank said Ashby was then president) as collateral security for his note of $12,000, due August 16, 1893.

On the 26th day of July, 1893, said Ashby made an assignment of his property for the benefit of creditors, to one, Robert S. Ford, assignee; included in said assignment, was the certificate for the one hundred and fifty shares of stock aforesaid, which was described as then held by the Merchants' Loan & Trust Company in pledge. (Rec., 10.)

Nothing further was done with this stock, and it continued to stand in the name of Ashby until December 26, 1894, when it was sent by the defendant to the then president of the Helena National Bank, with instructions to transfer to the name of P. C. Peterson. (Ex. G. Rec., 24.)

Some time between December 31st, 1894, and April 22nd, 1895, the Helena National Bank was with the consent and approval of the Comptroller of the Currency, consolidated with the First National Bank of Helena.

No further change was made until May 17, 1895, when the certificates so standing in the name of Peterson were by the defendant sent to E, D. Edgerton, Manager, Helena, Montana and exchanged for one hundred and twenty shares of stock in the First National Bank of Helena. (Ex. I, Rec. 25.)

This transfer was without the knowledge of Ashby or his assignee, Ford. (Ex. L and M, Rec. 27 and 28.)

P. C. Peterson was, at the time of the transfer to him

of the stock, a clerk in the employ of the defendant, and without pecuniary responsibility, and held said stock for the defendant. (Rec. 12.)

The defendant caused the stock to be so transferred to Peterson because it was unwilling to appear as a stockholder on the books of other corporations and assume a stockholder's liability. (Rec. 12.)

Eight months before this exchange of stock, and some time before the consolidation of the two banks as aforesaid, the Helena National was the most prosperous of the five National Banks in Helena, its business was increasing rapidly, while the business of the First National was with equal rapidity diminishing—as shown by letter of E. D. Edgerton, President, dated September 5th, 1894—and comparative statement of Helena Banks enclosed and referred to in said letter. See Exhibit "B" (Rec. 14 to 19.)

On the 4th day of September, 1896, the First National Bank of Helena suspended, and on September 10th a receiver was appointed by the Comptroller of he Currency. On November 9, 1897, E. T. Wilson, the plaintiff, succeeded to the receivership and has since been and now is the receiver of said bank. On October 11, 1897, an assessment of $100 per share on the stock of said bank, payable November 11th, 1897, was levied by the Comptroller of the Currency, of which Peterson and the defendant were notified, but no part of the assessment so levied upon the one hundred and twenty shares held by Peterson for the defendant has been paid. (Rec. 13.)

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Specification of Errors.

First: The court erred in holding that the exchange by the defendant in error of stock in the Helena National Bank held by it in pledge, for stock in the First National Bank of Helena, if made without the consent or authority of Ashby, the pledgor, was nevertheless, a matter which might subsequently be ratified by him or his assignee, and that such subsequent ratification would relieve the defendant in error of the responsibility of such exchange.

Second: The court erred in holding that the burden of proof was upon the plaintiff in error to establish the fact that the original shares confessedly held as collateral, were wrongfully converted into the new stock, without the consent of the pledgor.

Third: The court erred in finding that the agreed statement of facts does not show the wrongful conversion by the defendant in error of the original shares into the new stock, without the consent of the pledgor.

Fourth: The court erred in its conclusion that the letters and other circumstances all indicate that the original shares were not wrongfully converted into the new stock, without the consent of the pledgor.

Fifth: The court erred in holding as a matter of law, that the general finding of the District Court is conclusive of the question as to the wrongful conversion of the original shares by the defendant in error.

Sixth: Said judgment is erroneous because it is in favor of the defendant in error and against the plaintiff in error, whereas, upon the entire record it should have been in favor of the plaintiff in error.

Brief of the Argument.

IT WAS URGED BY THE DEFENDANT IN ERROR IN THE COURT BELOW AND DOUBTLESS WILL BE HERE, THAT THE RECORD MADE IN THE TRIAL COURT AND THE SPECIFICATIONS OF ERROR PRESENTED NO QUESTION FOR REVIEW, IT BEING CONTENDED THAT THE RECORD CONTAINED NO STATEMENT OF ULTIMATE FACTS AND NO SPECIAL FINDINGS UPON WHICH THE JUDGMENT OF THE TRIAL COURT WAS BASED.

The Circuit Court of Appeals announced no decision upon this point, and it may be fairly inferred from the somewhat lengthy discussion of the facts, that the objection was not considered as well taken; in as much, however, as this question strikes at the power of this court to now review the record, we deem it proper to call attention to it at the outset of the argument.

This contention of Counsel for defendant in error was based upon the fact that in the agreed statement of facts, upon which the case was submitted, reference was had to a number of letters and statements attached thereto as exhibits, which it is claimed are not conclusive, but only evidentiary.

The Statement of Facts beginning on page 9 of the Record and ending with the exhibits on page 28, is followed by a stipulation:

"It is hereby stipulated and agreed between the parties herein that trial by jury in this case be waived. That this cause may be submitted to the Honorable Christian C. Kohlsaat, Judge of this court, upon the foregoing State-

ment of Facts duly signed by the attorneys of the parties respectively, and that for the purposes of such trial the said Statement of Facts shall be taken as absolutely true, and shall be taken and construed as all the facts concerning the transactions therein referred to, subject to any and all objections which might properly be urged to the competency or materiality of any part thereof."

This statement of facts with the exhibits and stipulation were subsequent to the entry of judgment by the District Court, and on the 13th of May, 1899, allowed and filed as a Bill of Exceptions in the case. (Rec. 9.) The certificate of the trial judge to the same being as follows:

> "The above and foregoing contains all the evidence presented to the court at the hearing and upon which the finding and judgment of the court was based, and upon application of the attorney for the plaintiff the same is allowed as a Bill of Exceptions in the case and ordered to be filed as such. (Rec. 28.)

The judgment of the court is in the following language:

> "Now come the parties by their attorneys, thereupon the jury is waived by written stipulation and this cause is submitted to the court for trial, and the court having heard the evidence and arguments of counsel and being now fully advised, finds the issues for the defendant. To which finding the plaintiff excepts, etc." (Rec., 8.)

Reading this judgment and finding of the court in connection with the Bill of Exceptions, it is no more than a declaration that the court found the law to be in favor of the defendant on the case as stated.

Supervisors v. *Kennicott,* 103 U. S., 554.

We understand the rule with reference to questions of this kind to be, that where the record presents conflicting

evidence as to questions of fact, a Court of Review will not assume the functions of a jury and weigh the evidence to determine whether or not the finding of the lower court is supported by the evidence, but, when the case comes up either upon a special verdict, a special finding by the court, or a general finding, where the facts are without dispute and agreed between the parties, a Reviewing Court has the right and power, and has never refused to consider the case at length to determine whether, upon the facts as so stated or agreed, the decision of the trial court is right as a matter of law.

This question has been under consideration by this court and fully determined so frequently, that we should not be inclined to give it more than passing notice but for the fact that the high standing at the bar of counsel for defendant in error is sufficient to justify the presumption that he does not thus seek to avoid the consideration of this case upon its merits without himself believing that his objections are well taken. We therefore, beg the indulgence of the court while we refer briefly to former decisions on this point.

Counsel for defendant in error, in his brief filed in the Court of Appeals, refers to the case of *Supreme Lodge Knights of Pythias* v. *England,* 94 Federal, 369, where the question was as to the sufficiency of the evidence to sustain the general findings of fact; and, *Hoge* v. *Magnes,* 56 U. S. App., 500, where the general finding was based upon conflicting evidence which covered many pages of the record, and an agreed statement relative to a part, only, of the facts; and, *Minchen* v. *Hart,* 36 U. S. App., 534, where the case was tried upon evidence taken before the court, and where the assignment of error was that the evidence did not warrant the court in finding the issues

of fact as it did. And lastly, the case of *Lehnen* v. *Dickson*, 148 U. S., 71, where the court expressly stated, "There is no special findings of fact and no agreed statement of fact." This last case expressly recognizes the rule which we are contending for, as the court says:

> "It is true if there be an agreed statement of facts submitted to the trial court and upon which its judgment is formed, such agreed statement of facts will be taken as the equivalent of a special finding of fact."

The earliest decision of this court to which we shall call attention is that of *United States* v. *Eliason*, 16 Peters, 292. There the record contained an agreed statement, not of ultimate facts, but of the evidence, upon which the case was submitted. This evidence embraced on the part of the plaintiff a transcript from the Treasury Department covering several pages of the record, evidence on the part of the defendant to show that the original defendant (then deceased) was a captain in the United States Corps of Engineers, and as such superintended and had charge of certain work; Regulations of the War Department showing the rate and percentage of compensation allowed in such cases, and further evidence on the part of the defendant showing the disbursements by intestate, and claiming credit for certain compensation, a part only, of which had been allowed; evidence that the claims had been submitted to, and rejected by the accounting officer of the Treasury; and further, a statement of the state of the appropriations under which the disbursements were made. The plaintiff then offered in evidence regulations of the War Department and provisos in certain Acts of Congress; and upon such statement it was submitted to the court to say whether intestate was entitled to the allowances claimed by him, as a matter of law.

The question was raised as to whether a writ of error would lie from the decision.

The trial court made no special finding of fact, but announced only its conclusions of law upon the evidence as thus stated, and this court after a lengthy discussion of the practice in the English courts, and the various decisions in this country prior to that time, said:

> "This court therefore, have no hesitancy in declaring the point of practice raised by the defendant's counsel presents no objection to the regularity in the mode of bringing this case before them."

And again, in *Stimpson* v. *Railway Company,* 10 Howard, 329, which was a suit for an alleged infringment of patent right, the cause was submitted to the court upon a statement of facts, which entered into details of evidence, contained schedules referred to in letters patent, and the letters themselves, and it was submitted to the court to determine, "whether the defendant under a just construction of said patent declared upon, has been guilty of any violation thereof * * * * * and that the court shall have the power to draw all inferences from the facts herein stated, which could be drawn by jury."

In this case the right of the court to take cognizance of the cause was disputed.

The opinion is by Mr. Justice Daniel, who discusses at length the specifications in the patent, and concludes, as follows: "This court therefore, has no hesitancy in declaring the point of practice raised by the defendant's counsel, presents no objection to the regularity in the mode of bringing the case before it."

This question was again presented in *Suydam* v. *Williamson, et al,* 20 Howard, 427.

The opinion is by Mr. Justice Clifford, who, after discussing at some length, the rules of practice and the reasons for them, says:

> "And we here remark for the purpose of illustration, it is not so much because the proceeding is denominated a special verdict that the party by virtue of it is authorized to invoke the aid of a revisory tribunal, as it is because it has the effect to incorporate the facts of the case into the record, which otherwise would have rested in parol, and therefore could not have been reached on a writ of error." And again, "where there is no dispute in regard to the facts, and consequently no necessity for any ruling of the court in admitting or rejecting evidence, the same purpose may be safely accomplished by special verdict, or according to the rule established in this court, by an agreed statement of fact."

We think it may be safely said, therefore, that a case is entitled to review upon the merits wherever and whenever the record places the Appellate tribunal in the same position as to the facts, and with all the information touching the questions involved, that was before the trial court at the time of entering the judgment complained of.

And submit, with entire confidence, that the record in this case, presents solely questions of law which this court can pass upon with the same freedom and understanding as did the District Court.

Owing to the fact that there are presented no questions which call for specific rulings, that the finding of the trial court was a general one, and that the finding and judgment of the Circuit Court of Appeals presents no propositions separately and specifically stated, we have experienced no little difficulty in determining upon the order and arrangement of our argument in this court, as all questions arising from the record converge toward a

single point, viz: Upon the facts stated. Is the defendant in error liable for the assessment upon the shares in the First National Bank of Helena in controversy?

We have, therefore, after due consideration, adopted the following arbitrary division of the question.

Point I.

THE ONE HUNDRED AND TWENTY SHARES OF STOCK WERE HELD BY P. C. PETERSON AS AGENT FOR THE DEFENDANT IN ERROR, AND DEFENDANT IN ERROR IS LIABLE FOR ANY ASSESSMENTS WHICH HE MIGHT BE CALLED UPON TO PAY.

Point II.

THE SHARES OF STOCK IN CONTROVERSY ARE NOT AND NEVER WERE HELD BY THE DEFENDANT IN ERROR OR P. C. PETERSON AS PLEDGEE.

Point III.

BY THE EXCHANGE OF THE STOCK IN THE HELENA NATIONAL BANK ORIGINALLY PLEDGED, FOR THE SHARES IN THE FIRST NATIONAL BANK, THE DEFENDANT IN ERROR BECAME, FOR THE PURPOSES OF THIS ACTION, THE REAL OWNER OF THE SHARES SO RECEIVED IN EXCHANGE.

Point IV.

THE FACT OF AN UNLAWFUL SALE HAVING BEEN ESTABLISHED, THE BURDEN OF PROOF IS UPON THE DEFENDANT IN ERROR TO SHOW SUBSEQUENT RATIFICATION BY A PERSON AUTHORIZED TO RATIFY SUCH SALE, OR ANY OTHER MATTER IN AVOIDANCE OF LIABILITY.

Point I.

THE ONE HUNDRED AND TWENTY SHARES OF STOCK WERE HELD BY P. C. PETERSON AS AGENT FOR THE DEFENDANT IN ERROR, AND DEFENDANT IN ERROR IS LIABLE FOR ANY ASSESSMENTS WHICH HE MIGHT BE CALLED UPON TO PAY.

In *Davis, Receiver,* v. *Stevens,* 17th Blatch., 259, Stevens was sued for an assessment upon stock standing in the name of one Elston on the books of the bank at the time of the failure. It did not appear from the record that any of the shares upon which the assessments were levied had ever stood in the name of Stevens on the books of the bank, but that Stevens had actually purchased them through Elston, his agent, and by his direction they had been placed in the name of Elston. Upon this state of facts the trial court directed a verdict in favor of the defendant. The opinion is by Waite, Ch. J., who, after discussing the several questions presented, on page 261, says:

> "Under these provisions of law, it is contended that the registered shareholders alone can be charged with statutory liability, and that an assignee of stock does not make himself responsible unless he accepts an actual transfer in his own name on the books. * * * Stevens, by his transfer on the books, undoubtedly released the vendors from all future liability, because, as to them, the transfers were 'out and out,' in the language of the English cases, and not colorable only. They retained no interest whatever, and Elston the registered transferee, although pecuniarily irresponsible, was capable in law of assuming the obligations of a shareholder. As between Stevens and Elston, however, *Stevens was the real owner,*

and Elston his authorized representative in the bank. Every principal is responsible for the obligations of his agent. The debt of the agent is the debt of the principal. By the rules of law which govern the relations of principal and agent, the registry on the books in the name of Elston was, as between Stevens and Elston, in legal effect, the same as a registry in the name of Stevens. The obligations which Elston assumed by reason of such registry were the obligations of Stevens."

In Case *Receiver* v. *Small,* 10 Fed. Rep., 722, which was a suit by the receiver of the Crescent City National Bank to recover an assessment upon fifty shares of stock, it appeared that the fifty shares were sold, just prior to the failure of the bank, through a broker; that they were purchased by I. K. Small, and paid for by him, and were transferred on the books of the bank by the broker to Miss E. M. Small, his sister; that Miss Small was a person of no pecuniary responsibility. Upon these facts the court said:

"And finally, it is argued that under Sec. 5151, Rev. St., no person can be made liable unless at some time or other he has been a stockholder of record, and been held out to the world as such. The law seems to be settled now, that the owners of stock are liable under that section.

"At the same time those persons who hold themselves, or allow themselves to be held out as owners of stock, are liable whether they own stock or not. It would seem that the rules relating to the ownership of national bank stock are about the same as applied to partnership. Real partners are liable, though not publicly known as partners, and persons who allow themselves to be held out as partners are liable, though they have no real interest."

Accordingly a decree was entered against I. K. Small, the purchaser of the stock.

In *Hubbell* v. *Houghton*, 86 Fed. Rep., 547, it is said:

> "The shares of the capital stock of the National Banking Association involved in this litigation were never entered on the books of the association in a way which would indicate ownership of them by the defendant; nevertheless, when they were acquired by the parties in whose names they appeared on its books at the time it became insolvent, they were acquired by them as the agents of the defendant; and from the time they were acquired the substantial proprietorship had always been in the defendant, and the defendant had always held the corresponding stock certificates, so indorsed that it was in his power to have the shares properly registered in his name at any time."

After an elaborate discussion of the authorities the court by PUTNAM J., rendered judgment for the full amount of the assessment.

This judgment was affirmed by the Circuit Court of Appeals in *Houghton* v. *Hubbell*, 91 Fed. Rep., 453. The opinion is by ALDRICH, District Judge, who says:

> "In this case we have no cause to deal with the question whether the assessment could have been sustained against the agents who purchased the stock for Mr. Houghton and appeared on the records of the bank as owners. The fact that the record holders may be held does not necessarily mean that the actual holders may not be held. The general finding established the fact that the defendant was the real owner of the stock at the time the bank suspended and when the assessment was made by the comptroller. While there is perhaps no express Supreme Court authority to that effect in a case exactly in point, the various expressions in the following authorities indicate clearly enough the understanding of the Supreme Court, that the real owner may properly be assessed and held (then follows a discussion

of various decisions of the Supreme Court, also the case of *Davis* v. *Stevens, Id.*) It is according to principle that a burden of this character should rest upon the actual owner, and as a general rule there is no safer party to pursue than the actual responsible owner, upon whom the ultimate liability must rest. Assuming that an assessment could have been successfully maintained against the agents who stood upon the bank records as owners, still the Comptroller might properly, in his discretion, elect to pursue directly the actually known owner. In doing so in this case, the Comptroller elected the most equitable of the legal remedies and the one which sensibly avoided circuity of action and unnecessary litigation by striking at once the source upon which, if no exceptional circumstances exist, and necessary remedies were employed by the agents, the statutory burden must finally fall. It cannot be seen that any legal rule interposes in a situation like this, to prevent reaching a result directly which admittedly can be reached indirectly. Neither can we see any prudential reason for pursuing an indirect legal course when a direct one is fairly and plainly open."

The foregoing authorities seem to fully support our first contention and justify the court in this case in rendering any judgment against the defendant which might have been recovered against P. C. Peterson, as the admitted facts show conclusively that he was the agent of the defendant.

It is contended on the part of defendant in error that Peterson could not be held liable for an assessment because, he as a matter of fact, held the stock as trustee for the defendant, and that Section 5152 of the Statute expressly exempts trustees from any personal liability.

From the language of the entire section, it must be apparent that the person to be protected as trustee is the representative of some deceased person, or person who

is laboring under disability, rendering him incompetent to act and hold the stock in his own name, as the section referred to expressly provides, "That the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such funds would be if living and competent to act and hold stock in his own name.

Point II.

THE SHARES OF STOCK IN CONTROVERSY ARE NOT AND NEVER WERE HELD BY THE DEFENDANT IN ERROR OR P. C. PETERSON AS PLEDGEE.

Had this action been brought to recover an assessment levied upon the stock of the Helena National Bank, pledged by Ashby to the defendant on the 15th day of April, 1893, doubtless the defendant could have escaped liability, but such is not the case. That pledge was terminated when, on the 17th day of May, 1895, more than two years after such pledge was made, the defendant sold the said stock to E. D. Edgerton, and received in exchange therefor the stock which is now in controversy. In *Robinson* v. *Southern National Bank of New York*, 94 Fed. Rep., 964, it appeared that in January, 1893, one Curtis was the owner of 180 shares of the capital stock of the State National Bank of Vernon, Texas, which stood in his name on the books of the bank and for which he held the usual certificates; on that day he pledged the shares with the defendant as collateral security for the payment of certain liabilities, including a note for $15,000, payable four months after date; that the note was not paid at maturity, and in August, 1893, the defendant

advertised the stock to be sold at auction at the public exchange in New York City, and gave eight days' notice by telegraph to the pledgor; at the sale the defendant bought the stock and credited the proceeds of the sale upon the note; the certificates remained in possession of the defendant, but the stock was never transferred to the defendant upon the books of the bank. Upon these facts the Circuit Court of Appeals of the Second Circuit held:

> "That the facts certainly would have justified a finding by the jury that the relations of pledgor and pledgee had been terminated by the defendant, and the defendant had become the purchaser of the stock with the intention of becoming the exclusive owner, and was in this sense its owner when the bank failed. The only ground upon which it could be ruled that the plaintiff was not entitled to recover was that, as the stock had never been transferred to the defendant upon the books of the bank and remained in the name of the original owner, the defendant was not a shareholder within the meaning of Section 5151."

Now, if, as in that case, the relations of pledgor and pledgee terminated when the identical stock pledged was bought in by the pledgee, which stock, while so standing in the name of the pledgee, would be subject to redemption in equity by the pledgor, how much stronger is the reason for holding the pledge in the case at bar to have terminated on May 17, 1895, when the pledgee made absolute disposition to third parties of the stock pledged.

Again, to create a pledge, there must exist all of the necessary elements of a contract; first, there must be parties capable of contracting, and second, a coming together of the minds of the contracting parties; now, if it is to be said that the stock in controversy was held by the agent of the defendant in pledge, we ask, in all sincerity, by whom was the pledge made? Certainly not by Ashby,

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as he never owned the stock in controversy. The elements of mutuality necessary to the transaction are lacking, because neither Ashby nor his assignee were ever consulted concerning the transaction. According to the agreed statement of facts the exchange was made *with the consent and under the directions of the defendant.* (Rec. 11.)

If, then, as we have shown, Ashby did not pledge this stock at the time it was acquired by the defendant, and neither he nor Ford, who by the assignment of July, 1893, succeeded to the equity of redemption of the old stock, subsequently by affirmative action placed themselves in the attitude of pledgor, it is not in the province of the court to create by its judgment a contract between the parties, and therefore no pledge can be said to have existed.

Point III.

BY THE EXCHANGE OF THE STOCK IN THE HELENA NATIONAL BANK ORIGINALLY PLEDGED, FOR THE SHARES IN THE FIRST NATIONAL BANK, THE DEFENDANT IN ERROR BECAME, FOR THE PURPOSES OF THIS ACTION, THE REAL OWNER OF THE SHARES SO RECEIVED IN EXCHANGE.

By the Revised Statutes of the United States it is provided:

> Section 5139. "*** every person becoming a shareholder by such transfer shall in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares***"

As a matter of first impression it might occur to the court that the questions herein involved have been settled

by former decisions, and that the exhaustive opinion in *Pauly* v. *State Loan & Trust Company,* 165 U. S., 606, has disposed of all possible questions that might arise touching the liability of holders of National Bank stock, but, if we read the decisions correctly, the precise question presented by this record has never hitherto been considered.

In *Germania Bank of New Orleans* v. *Case,* Receiver, 99 U. S., 628, it was conclusively shown that the stock in controversy had been assigned to the Germania Bank as collateral security for the payment of a note. This note matured four days before the failure of the Crescent City Bank. On that day one hundred shares of the stock was transferred on the books of the Crescent City Bank to the Germania Bank. Seventy-six shares were immediately transferred to Waldo, one of the clerks of the Germania Bank, and on the following day the remaining twenty-four shares were transferred to him.

It was unquestioned that Waldo in holding the stock acted as the agent of the Germania Bank, which was held liable for the assessment, not because of any question as to the fact of the stock being held as collateral security, but because by the transfer the liability of Phelps, McCullough & Co., the pledgors of the stock, for assessment, ceased at the instant of the transfer.

In *Anderson, Receiver,* v. *Philadelphia Warehouse Company,* 111 U. S., 479, The defendant was held not liable for assessments, because, although it appeared from the record that for seven years the stock had stood in the name of the agent of the Warehouse Company, it also appeared that the transfer was originally made as a pledge; that the pledgor of the stock had during that en-

tire period of time received dividends, voted the stock, and to all intents and purposes controlled the stock.

This decision in no sense modifies the doctrine of the Germania Bank case.

In *Pauly* v. *State Loan & Trust Co., Id.* The stock upon which it was attempted to hold the defendant liable, had been issued to it as pledgee, which fact appeared plainly not only upon the certificates, but upon the books of the bank, and although in the opinion, Mr. Justice Harlan discusses at great length, not only the theory and principles of the law, but all of the earlier decisions, not a syllable can be found that in the slightest degree criticises or modifies the decision in the Germania Bank case. On the contrary, the learned Justice says,

> "From these cases the following rules relating to the liability of the shareholders of National Banking Associations may be deduced. That the *real owner of the shares* (the italics are ours) of the capital stock of a National Banking Association may in every case be treated as a shareholder within the meaning of Section 5151***"
>
> "That if the real owner of the shares transfers them to another person or *causes them to be placed on the books of the association in the name of another person* (the italics are ours) with the intent simply to evade the responsibility imposed by Section 5151 on shareholders of National Banking Associations, such owner may be treated, for the purposes of that section, as a shareholder and liable as herein prescribed."

A careful reading of these various decisions indicates that the court has in all cases sought to reach a conclusion as to the real standing of the parties in interest, and this, it seems to us, is necessary in order to give effect to the plain terms of the statute.

Now, applying the principles of these and other decisions to the facts of this case—

When the stock in the Helena National Bank was pledged the authority given by Ashby was to sell it. This authority was specifically set out in the note, Exhibit "I" (Rec. 13) in the following language:

> "****and I hereby give the said Merchants Loan & Trust Company of Chicago, its assign or assigns, authority to sell the same or any part thereof, etc."

This language cannot be construed into an authority to sell except for cash or its equivalent, and when, on May 17th, 1895, the defendant exchanged this stock so pledged, for the stock in the First National Bank it was guilty of a conversion, and the pledgor thereafter had the option to affirm the sale and assert by proper proceedings, an ownership in the property received in exchange, so long as it continued to remain in the hands of the defendant, or to repudiate the sale and sue for damages.

In *Williamson* v. *Barry,* 8 Howard, 295, the court by Justice Wayne, says:

> "Sale is a word of precise legal import, both at law and in equity. It means a contract between parties to take and to pass rights of property for money which the buyer pays or promises to pay to the sellor for the thing bought or sold."

In *Griggs* v. *Day,* 136 New York, 152, Griggs had deposited with one Garrison promissory notes of the Wheeling & Erie R. R. Co., amounting to nearly two million dollars. Upon re-organization of the Company Garrison, without the knowledge of Griggs, exchanged the notes for second mortgage bonds of the Company. The court said:

> "It would make no difference whether we consider these notes as having been exchanged for the

bonds or having been used in payment for the bonds. In either, however, Garrison was at most guilty of a conversion of them..*..*..* * so we reach the conclusion as to all the notes, that Garrison by their surrender, made himself liable for a wrongful conversion of them to his own use, and thus became responsible to the plaintiff for the damages caused by the wrong."

In *Beckley* v. *Munson,* 22 Conn., 298, Beckley had conveyed to the defendant personal property consisting of railroad stock, coal, iron ore, wood, etc., as security for an indebtedness of about seventeen thousand dollars. By the conveyance the defendant was "authorized to sell and dispose of, or manufacture in whole or in part, as he should see fit." Subsequently, the defendant exchanged a portion of the property for twenty shares of railroad stock. Upon these facts the court by Waite, Justice, says:

"By the terms of the original conveyance the defendant for the purpose of raising money to pay the debts assumed by him, was authorized to sell and dispose of the personal property assigned to him as he saw fit. Under that authority he had a right to sell upon credit if necessary, and had a loss arisen upon such sale, fairly made, it might undoubtedly have been charged to the plaintiff."

And again:

"It was the duty of the defendant under these circumstances, with all reasonable diligence to convert property into money to pay off the debt. Instead of doing so, the committee find him some six months after, disposing of $2,000,000 of the assets in the purchase of railroad stock. * * * * This, in our opinion, was not a faithful execution of the trust as contemplated by the parties when the bond was given."

And in *Edwards* v. *Cotteral et al*, 43 Iowa, 194, it is said:

> "A mortgage of a chattel with power of sale by the mortgagee upon default in payment, confers upon him no right to barter the mortgaged property, or to dispose of it otherwise than for cash. Sale means at all times a contract between parties to pass rights of property for money, which the buyer pays or promises to pay to the sellor."

We might multiply authorities upon this proposition, but deem it wholly unnecessary.

If then, Ashby or his assignor (who may have succeeded to his rights) had the option to ratify his illegal sale by the defendant and claim the stock in the First National Bank, subject only, to the lien of the defendant for the balance, if any unpaid, upon the Ashby note, or to treat the transaction as a conversion of the original stock and sue the defendant for its value, it must be admitted that until such election had been exercised, and the ownership of the stock in the First National Bank claimed by Ashby or his assignee, the defendant was, as against the First National Bank itself, or its creditors, the real owner of the stock in controversy. Otherwise, said stock must be treated during that interval as being without an owner.

Such a condition seems to have been anticipated in the Pauly case, as the court says,

> "It may be suggested that if the pledgee is not held liable as a shareholder in respect to the shares of stock standing in its name as pledgee, then no one is liable to assessment as the owner of such stock, but, it is a mistake to suppose that Havermale and Collins ceased to be shareholders for the purposes of liability imposed by Section 5151. *They remain, notwithstanding the pledge, the actual owners of the stock.*" (The italics are ours.)

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We think it may be fairly inferred from this language, that the decision in that case holding the pledgee not liable turned upon that point.

Can it be said that in this case either Ashby or his assignee remained or ever became the actual owners of stock in the First National Bank? We apprehend that if the plaintiff in error had sued them for this assessment instead of the defendant in error, they would have answered "we are not now and never were the owners of such stock." And that the record in this case which states, "All the facts pertinent to the issue" would have fully and conclusively sustained such a defense.

But it is said by defendant in error "the exchange of the shares of the Helena National Bank for shares of the First National Bank was not a foreclosure or termination of the pledge. It was merely a substitution of the latter in place of the former—a formal matter of which no one could complain, and which in no wise, affected the rights of the parties. The certificates for one hundred and twenty shares in the First National represented exactly the same thing, only in better form, which was before represented by the certificates for one hundred and fifty shares in the Helena National Bank. The change was not of ownership or interest, but of evidence of ownership or interest."

Unfortunately for the position of the defendant in error, the courts do not take this liberal view of such transaction.

Where bonds were pledged as security to the payment of a debt, it has been held that a tender by the pledgee of different bonds, although there were the same number, of the same face value and of the same issue of those

pledged, did not relieve the pledgee of responsibility for damages in the absence of an affirmative showing that he had, at all times since the date of the pledge, held in his hands the exact number and equivalent value of the bonds pledged. In other words, if the pledgee chanced to hold at the time of the pledge, other bonds of the exact character of those pledged, the commingling of the two was not a conversion, and if subsequently he disposed of a portion of the bonds thus held by him, and at such disposition either inadvertently or otherwise, disposed of a portion of those pledged, it did not amount to a conversion providing the original number were at all times retained by him, subject to be redeemed by the pledgor.

Stewart v. *Biglers Assignees*, 98 Pa. St., 80.

But even in such a case, if it appears that the pledgee had actually disposed of the bonds pledged, and such others as were held by him, he cannot afterward purchase bonds of the same issue and of equivalent value, and by tendering them to the pledgor, acquit himself of liability for a conversion.

We know of no case, and think it may safely be said that no case can be found where a pledgee has been permitted to change the character of his security without the consent of the pledgor, and compel the pledgee to receive such substituted securities in lieu of the original pledge.

It is again urged on the part of the defendant in error that the consolidation of the Helena National Bank with the First National Bank was accomplished by operation of law, and that the holders of stock in the Helena National had no option but to consent to the exchange.

In the very able and exhaustive argument of counsel

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for the defendant in error in the court below, no authority was cited to support this contention. We, therefore, assume that none such can be found. No part of the National Banking Act or any other Act, State or Federal, authorizes any such action on the part of bank officers. Indeed, if the National Banking Act contains any provision affecting a question of this sort, it would seem, by implication at least, to provide for the protection of the interest of the minority stockholders in such cases. The Act of July 12, 1882, authorizes any National Banking Association to extend its period for twenty years from the date of the expiration of its corporate existence, by amendment of its Articles of Association, such amendment to be authorized by the written consent of the shareholders owning not less than two-thirds of the capital stock. It further provides, that if any shareholder does not assent to such amendment, upon notice in writing to the directors, he shall be entitled to receive from the Association the value of his shares, and provision is made for an appraisal of such value.

There is no special provision made for consolidation of National Banks, but, it is provided that banks organized under this Act may go into liquidation by a vote of two-thirds of its shareholders, and inferentially, perhaps, authorizes liquidation by such vote for the purpose of consolidation with another bank. It seems to us that the fair inference from these provisions of the Act is that a single stockholder may withdraw from the bank when any radical change is contemplated, either by extension of the period, or by liquidation, or consolidation, and compel the purchase of his stock at its appraised value.

The law is well settled that corporations other than National Banking Associations, cannot consolidate with

other corporations, or sell their property to other corporations, and accept in exchange the stock in such other corporation, and force such stock upon dissenting stockholders.

Cook on Corporations, 4th Ed. Sec., 671, and authorities there cited.

Assuming then, that the defendant in error had the right and power to have withheld its approval of the plan of consolidation and decline an exchange of stock as proposed, what would have been the result, and what effect would it have had upon the parties in interest and the questions now involved?

It must be apparent that such refusal on the part of the defendant would not have prevented the consolidation, as the statement of facts shows that more than two-thirds of the shareholders had consented to the consolidation before the defendant in error took any part in it. See letter of Edgerton under date of December 22, 1894 (Rec., 24); hence, the consolidation at that time was assured. The parties interested in such consolidation would have been compelled to purchase the one hundred and fifty shares held by the defendant in error. At that time this stock was worth eighty cents on the dollar of its face value, or twelve thousand dollars ($12,000), because of the reduction of the capital stock of twenty per cent. (Rec., 24.)

The letter of Mr. Edgerton (pages 14-18 of the record), shows conclusively that the business of the Helena National was upon a prosperous basis. We invite attention particularly, to that portion of the statement contained in said letter, on page 15, where it shows an increase of deposits from two hundred thousand dollars

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on August 1, 1893, to $682,330.06 on September 5, 1894, and an increase of cash and exchange on hand for the same period, of $17,000 to $224,063.47, so that at the last date the bank had an available reserve of thirty-three per cent. And again, on page 16, it shows an increase in the same period, of individual depositors from 227 to 547; and that while the general banking business of Helena had shrunk from a million and a half to two millions of dollars in the preceding two years, the volume of business of the Helena National had increased nearly half a million, and in that connection there appears a marked contrast between the condition of the Helena National and the First National, as during the same period the business of the First National had shrunk about a million dollars. And again, on page 17, Mr. Edgerton says, that instead of reducing the capital of the bank from $500,000 to $400,000, his judgment was to charge off $200,000 and put $100,000 or $150,000 into surplus and undivided profit account.

These statements of the then president of the Helena National Bank, being the same person who in May, 1895, received from the defendant in error its stock in the Helena National, standing as they do as a part of the agreed statement of facts, undisputed and in no manner qualified, seems to justify the conclusion that at that time the stock was of the value named, and that had the defendant in error refused to accept the exchange it would have received a consideration sufficient to have liquidated the debt of Ashby.

It may be said that this is a matter with which we have no concern in this case, but when it is considered that had such sale of the stock been made, the one hundred and twenty shares of stock in the First National,

received by the defendant in error, and by its direction placed in the name of P. C. Peterson on the books of the bank, would have continued the property of Edgerton or some of the parties interested in the consolidation scheme, and thus, upon the insolvency of the First National Bank which followed nine months later, the receiver would not have been obliged to meet the question here presented, and would not have been required to scour the country to find an owner for this stock, but, would have proceeded directly to enforce the assessment against Edgerton or such of his associates as held the particular stock in controversy, it becomes a question of vital and controlling interest.

IV.

THE FACT OF AN UNLAWFUL SALE HAVING BEEN ESTABLISHED, THE BURDEN OF PROOF IS UPON THE DEFENDANT IN ERROR TO SHOW SUBSEQUENT RATIFICATION BY A PERSON AUTHORIZED TO RATIFY SUCH SALE, OR ANY OTHER MATTER IN AVOIDANCE OF LIABILITY.

The argument of this point calls for an analysis and discussion of the opinion of the Circuit Court of Appeals.

First. The court says:

> "If the change was made (referring to the exchange of stock), without Ashby's consent, it was nevertheless, a matter of election on his part whether he would ratify it, and in the second place it is not shown by the statement of facts, that the consolidation and substitution of the one stock for the other were not affected by his authority, or were not afterward ratified by him." (Rec., 39.)

The first premise would doubtless, have been correctly stated if Ashby had still retained the equity of redemption, but as has been shown, on July 26, 1893, he had conveyed all his interest to Ford (Rec., 10), and ratification by him would not have, in any manner, affected the transaction.

The second premise must be separated in two parts.

THE FIRST, THAT AN EXCHANGE WITHOUT ASHBY'S AUTHORITY WAS NOT SHOWN, AND THE SECOND, THAT THE EXCHANGE WAS NOT RATIFIED BY HIM.

The first, is not supported by the record. The authority given by Ashby is found in the collateral note (Rec., 14), and is "to sell the same," not to barter or exchange; and is the only authority shown by the statement of facts to have been given; and that no other had been given appears conclusively from the letter of Orsen Smith, vice-president of the defendant, transmitting the old stock for exchange, under date of September 24, 1894, seventeen months after Ashby had transferred his interest to Ford; wherein the question is asked: "Where can Mr. Ashby be found," and the statement, "In a matter of this kind we would like very much to have him consent to our action." (Rec., 24; Ex. G.)

The answer of Edgerton, president of the Helena National Bank, under date of December 31, 1894 (Rec., 25), says, "Mr. Ashby is still here in Helena, but I doubt if you could get his concurrence on anything as he has apparently literally gone all to pieces," and no further correspondence is shown prior to the final exchange May 17, 1895, which was accomplished by the letter of defendant in error. (Rec., 27.) While the stipulation shows that all the correspondence relating to the stock, so far

as it is material, is set out in and attached as exhibits to the statement of facts (Rec., 12), and the same shall be taken and considered as all the facts concerning the transaction. (Rec., 28.)

We submit with confidence that it is shown that the exchange was without Ashby's consent.

Coming then, to the second proposition, the learned court seems to regard the burden of proof as upon the plaintiff in error to negative ratification by Ashby. This is certainly a mistaken view of the law. The rule is thus announced by GREENLEAF:

> "In many actions of tort there are many possible justifying circumstances, self defense, etc., but it would be both contrary to experience to assume that one of them was present, and unfair to require the plaintiff to disprove the existence of each one of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances which would, if existing, leave him without a claim, are put upon the defendant to prove." Greenleaf on Evidence, 16th Ed. Sec., 14, w., Pg. 97.

In *Great Western R. R. Co.* v. *Bacon*, 30th Ill., 353, the Supreme Court of Illinois say:

> "It is not easy to lay down a general rule by which it may be readily determined upon which party the burden of proof lies, when a negative is averred in the pleading. Each case must depend upon its peculiar characteristics, and courts must apply practical common sense in determining the question. When the means of proving the facts are equally within the control of each party then the burden of proof is upon the party averring the negative; but when a party must, from the nature of the case, be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and

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reasonable that the party thus in the possession of the proof should be required to adduce it, or upon his failure to do so we must presume it does not exist, which of itself establishes a negative."

In *Royall's Administrators* v. *McKenzie et al.*, 25 Ala., 363. It appeared that Royall had made an assignment for the benefit of creditors to the defendants. The defendants had taken from one of Royall's debtors land in satisfaction of the debt. Suit was brought to recover from the assignees the amount of such debt. On page 370, it is said:

"The answer of McKenzie alleges that Royall, who was absent at the time the land was taken in discharge of the debt, on his return was advised of the arrangement and was perfectly satisfied with it. Had this allegation been sustained by the evidence there would be no question that the complainant, as the representative of Royall, could not charge McKenzie with the debt. But these facts are not established, and the answer is not proof, such circumstances being matter in avoidance which requires evidence *aliunde* to sustain it."

In *Spaulding* v. *Bank*, 9 Barr, 28. Suit was brought to recover the amount of a promissory note. It appeared that the debtor had deposited bank bills with a trustee as security for the debt, and the same were not accounted for. In the trial court it was held that the defendant who claimed the benefit of the collaterals, must show that they had been collected or lost by carelessness of the bank before he could claim the benefit of them in reduction of the indebtedness. The Supreme Court, however, takes a different view of the question, and says:

"It was easy for the bank to give an account of what was done with them. Good faith requires that they should do so, and the law will hold them to it."

In *Hunt* v. *Douglas*, 22 Vermont, 129, plaintiff had delivered a horse to his brother, I. K. Hunt, to be used and sold. He exchanged that horse with Lee for another horse and $15 to be paid to the plaintiff, with an agreement that the title to the horse was to remain in the plaintiff until the $15 was paid. Lee subsequently, and without paying the $15, exchanged the horse for another and still another. The latter was attached on a debt against Lee. This suit was to recover possession of the horse from the constable having it under attachment. It was held, title did not vest in the plaintiff until the exchange was ratified, and there being no evidence of ratification plaintiff could not recover.

The same doctrine was recognized in *Strong* v. *Adams*, 30 Vermont, 221, where a debtor left property with a creditor as security. The creditor exchanged it for other property, the latter was attached as the property of the creditor. The Supreme Court decided that a ratification by the original owner of the pledged property must affirmatively appear, but that the bringing of suit by the debtor immediately after the exchange of property was such ratification.

Second. The court further says:

> "Nor that they were not effected by the authority of, or afterward ratified by his assignee Ford. Neither is it shown that the assignee under the law, and by order of the court, and by the consent of Ashby, did not have authority to consent to the substitution."

This proposition must be governed by the rules of evidence last announced.

The statement does show conclusively that the exchange of stock was made without the authority of Ford,

as, in his letter to defendant in error under date of January 4, 1896, eight months after the exchange was effected (Rec., 27) Ford says, "Kindly let me know if you still hold this stock and whether one hundred and fifty shares of the Helena National Bank or one hundred and twenty of the First National Bank, which number of shares would be issued you in case of transfer. And there is absolutely no evidence to qualify this letter, or the presumption raised thereby.

And a subsequent ratification by Ford, if it would be available at all as a matter of defense, must be proved by the defendant in error. There is no hardship in this. Such proof, if it existed, was in the hands of the defendant in error. The plaintiff in error could have no knowledge of the fact, and the failure of defendant in error to produce such evidence, raises a conclusive presumption that it did not exist.

Mantony v. *Reilly*, 184 Ill., 203.

The question of the authority of the assignee to have ratified the exchange seems to us to be a question of law.

Prior to the year 1895 there existed in the State of Montana no statutory law relating to assignments for the benefit of creditors. In the Code of 1895 provision is made for such assignment, Section 4510 reading as follows:

> "An insolvent debtor may in good faith execute an assignment of property to one or more assignees, in trust for the satisfaction of his creditors, in conformity to the provisions of this chapter, subject, however, to the provision of this code, relative to trusts and to fraudulent transfers, and to the restriction imposed by law upon assignments by special partnerships, by corporations or by other specific classes or persons."

But the act contained absolutely no provision with respect to the manner of sale, and no such provision is to be found in any subsequent enactment; hence, Ford was with respect to the estate of Ashby, governed by the common law principles regulating this subject. He was but the trustee of the property, and in discharging his trust had no greater or different powers than are conferred by common law upon trustees generally. Such transfer is made in trust to apply the assigned property or the proceeds thereof to the payment of the assignor's debt.

In *In re Barnes,* 140 New York, 468, it is said:

> "The law neither authorizes nor permits the assignee to make any investment of the moneys received by him in his trust capacity. It is his duty promptly to convert the asset's of the insolvent's estate into money, to keep the funds securely, and at the time and in the manner required by law to distribute them among the creditors and other persons entitled to them."

In Chambersberg Saving Fund Association Appeal, 76 Pa. St., 203, a Saving Fund Association holding the title to lands as a collateral for a debt due them, assigned for the benefit of creditors. The assignee being informed that the debtor had no title to the lands, without proper investigation took from him other securities and reconveyed the land to him. The debt being lost, it was held "that the assignee was liable for its amount on the ground of supine negligence."

If an assignee sells on credit, he does so at his peril. If any loss results, he is personally liable.

Miller v. *Holcomb,* 9 Gratt (Va.) 665.

> "An assignee is not authorized to barter or exchange property."
>
> Burrill on Assignments, 505.

In *Page* v. *Olcott,* 28 Vermont, 469, it is said:

> "An assignee or other trustee who barters trust property, should be charged with the value of the property and interest thereon."

Discussing the policy of the law, the court says:

> "Cases may be supposed, where it might be to the interest of all concerned to allow the trustee to barter or exchange trust property, yet this is aside from the trust and would open the door for fraud and the law will not sanction it."

From these authorities the conclusion is reached that Ford as assignee of Ashby had no power to consent to the exchange of the stock of the National Bank for stock in the First National Bank in the absence of the affirmative showing that he was specifically authorized by the deed of assignment to exercise such power.

TO RENDER RATIFICATION EFFECTIVE AS A DEFENSE IT MUST APPEAR THAT SUCH RATIFICATION WAS MADE BEFORE THE RIGHTS OF THIRD PARTIES HAD INTERVENED.

This question is discussed at length in *Johnson* v. *Johnson,* 31 Fed., 700. The opinion on page 703 sums up the authorities quoted, in this language, which we submit, correctly states the rule of law which ought and does govern all such cases:

> "These cases are not directly in point on the question under consideration which is undecided; but they recognize the true distinction as to the application of the retrospective effect of the ratification of unauthorized acts of an agent by his principal. That distinction is, there must be some mutuality between the ratifying principal and the third party who is to be affected by his ratification, else the ratification will not have a retrospective effect as against the interest of such third party."

This statement of the learned judge who delivered the opinion, seems to be founded in reason, and is especially applicable to the facts in this case, by the transfer of the stock in the First National Bank of Helena to Peterson, the agent of the defendant in error, as we have shown heretofore in this argument; the rights of the bank or anyone who might thereafter represent it as receiver, to proceed against any former owner of the shares for assessments, was lost, and as we have also shown, to create a liability on the part of Ashby or his assignee, required some mutuality; and agreement on the part of Ashby or his assignee to be treated as the real owner of the stock.

This principle is also recognized in *Parmerlee* v. *Simpson,* 5 Wallace, 81.

Moritz v. *Hoffman et al.,* 35 Ill., 553.
Wittenbrock v. *Bellmer,* 57 Cal., 12.
Wood v. *McCain,* 7 Ala., 800.
Norton v. *National Bk.,* 14 So. Rep., 872.
Kempner v. *Rosenthal,* 81 Texas, 12.
Pollwell v. *Cohen,* 32 Ohio St., 525.
Conner v. *Littlefield,* 79 Texas, 77.

And in *Fiske* v. *Holmes,* 41 Me., 444, where it is said:

> "As the absence of previous or contemporaneous assent renders the ultimate validity of a transaction contingent, it being doubtful whether the necessary ratification will ever be given or not; it necessarily follows that the subsequent assent does not relate back so as to prejudice a party whose conduct has been guided by the transaction as it actually occurred."

And in *McMahan* v. *McMahan,* 13 Pa. St., 381, where it is said:

> "By such ratification the doings of the agent be-

come the acts of the principal; unless, indeed, it might operate to over-reach and defeat rights acquired *bona fide* by third persons, or subject them to some loss or penalty to which they would not otherwise be liable."

And in *Taylor* v. *Robinson et al.,* 14 Cal., 396, the plaintiff had given to one Dunlap general authority to do all acts necessary in and about the collection and securing of a debt owing by one Johnson; Dunlap took a bill of sale of certain property in liquidation of the indebtedness. Shortly afterward the sheriff, at the instance of a creditor of Johnson levied upon the property so sold. Taylor brought this suit against the sheriff and Robinson for taking the property which he alleges he was the owner of. It was held by the court that the general authority to collect and secure the debt was not sufficient to authorize the purchase of the property, and with regard to the ratification says:

"Now, although the general rule is that the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy, yet, this doctrine is not universally applicable. Thus, if a third person, acquire rights after the act is done, and before it has received the sanction of the principal, ratification cannot operate retrospectively so as to over-reach and defeat those rights."

Third. The court further says:

"It was alleged in the declaration, and the plaintiff in error therefore had the burden of proof that the Trust Company purchased and became the owner of one hundred twenty shares of the capital stock of the said First National Bank of Helena. To establish that averment it was necessary to show that the original shares confessedly held as collateral were wrongfully converted into the new stock without the consent of the pledgor; but, the fact is not so stated in the agreement; the letters and other circumstances all indicate the contrary."

We concede that the burden of proof was upon the plaintiff in error to establish the fact alleged, that the Trust Company purchased and became the owner of the stock in controversy, and insist that such fact is fully established when we have shown an exchange of the original shares for such stock in a manner not authorized by the contract of pledge, and that it was incumbent upon the defendant in error to establish by affirmative proof, ratification of the illegal sale, or any other fact which might be urged in avoidance. That this was not done we have shown by the record.

Fourth. The last conclusion of the court is, "The general finding of the court is conclusive of the question."

This suggestion is not only not supported by the authorities, but is directly contradictory of the rule announced by this court in *Supervisors* v. *Kennicott,* 103 U. S., 554, heretofore referred to herein, where the court by Mr. Chief Justice Waite says:

> "It is true that in the judgment as entered it is stated that the court found the issue in favor of the plaintiff, but that, when read in connection with the bill of exceptions, is no more than a declaration that the court found the law to be in favor of the plaintiff, on the case as stated * * * There was no issue but of law, and that the court found for the plaintiff."

In conclusion we submit, that under no rule of law and upon no theory of the facts, as stated, can it be held that either Ashby or his assignee, Ford, are and were at the time of the commencement of this suit, the legal owners of the one hundred and twenty shares of the stock in the First National Bank of Helena upon which the assessment is sought to be recovered.

That when corporate stock has been issued and paid for so far as the corporation issuing it is concerned, and passed beyond the control of said corporation, no condition of fact can be conceived that will divest such stock of ownership and leave it without a legal owner.

That if the decision of the Circuit Court of Appeals shall be affirmed, the stock in controversy will be in that anomalous position.

The National Banking Act clearly contemplates that the shares in national banks shall at all times, until final liquidation, be subject to assessment for the benefit of the creditors of such bank, and to hold that the defendant in error is not liable for the assessment sued upon, will not only do violence to the letter and spirit of the law, but will pave the way for unscrupulous and dishonest holders of shares in such national banking associations to avoid the responsibility imposed upon them by law.

We therefore, insist that the judgment of the Circuit Court of Appeals is manifestly wrong and should be reversed.

Respectfully submitted,

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